IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 656 OF 2000

Deepak Dnyaneshwar Navgire,]
Life Convict No.C/11107,]
Yerawada Central Prison,]
Pune – 411 006.].. Appellants (Accused No.2)

Versus

The State of Maharashtra.] .. Respondent (Complainant).

Mr. B.G. Tangsali, Advocate appointed for the appellant/accused.

Mrs. U.V. Kejriwal A.P.P., for the State.

CORAM: V.G. PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED: 5TH OCTOBER, 2004.

ORAL JUDGMENT: *[Per Anoop V. Mohta, J.]*

1. This is an Appeal filed by the appellant-accused No.2 and challenged the order of the Additional Sessions Judge, Greater Bombay, dated 13th January, 2000, in Sessions Case No. 1283 of 1996, whereby, he has been held guilty and convicted under Section 302, 394 read with 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life. He has also been convicted under Section 397 of the IPC. He has also been directed to pay fine of Rs.10,000/- and, in default, to undergo further rigorous imprisonment for one year. Therefore, this Appeal against the order of conviction.

2. One Anil S. Chaudhari was murdered by the accused on 29th July, 1997, at about 3.50 a.m. on Platform No.1 of Mumbai Central Local Railway Station, by means of *gupti* and choppers. The accused, along with other absconding accused, was also charged for having committed robbery by using deadly weapons viz. *Gupti* and choppers and robbed the complainant, Vilas Hari Bansode, of his wrist watch and cash of Rs.340/-.

On 29th July, 1997, the deceased Anil, along with PW1 and PW2 was sleeping on Platform No.1 and at about 2.30 a.m., as alleged, two people came and tried to search the person of PW2. However, they left the place immediately. After some time, all the accused gathered at the spot of occurrence. They were armed with *gupti* and choppers. They threatened PW2 and robbed the valuables, including the wrist watch and cash of Rs.340/-. PW1 was also searched for valuables, but nothing was found on his person. Out of these four, accused No.1 with the *gupti* went near Anil Choudhari and put the *gupti* near the abdomen and was trying to wake up Anil Chaudhari. The accused No.1, in this process, pressed the *gupti* in the abdomen of the deceased Anil Chaudhari. After realising this, all these four accused, who were armed with *gupti* and choppers, fled away from the scene. PW1 – Vijay and PW2 - Vilas, therefore, approached the nearby Office and called a constable from the Railway Police and the said injured was taken to Nair Hospital on a stretcher. However, he was declared dead before admission into the Hospital. The Police, therefore, recorded the statement of PW2 and FIR was registered accordingly. The statement of PW1 – Vijay Ganpat Narvekar was also recorded. The accused No.1 was

arrested on the same day. The appellant-accused No.2 was arrested under a Transfer Warrant and brought from Delhi Police custody on 3rd October, 1996. After completion of the investigation and receipt of the Chemical Analyzer's Report, both the accused were charge sheeted. The prosecution has led the evidence of 6 witnesses. The accused denied the charges, but have not examined any witnesses in support of their case.

3. The learned Sessions Judge, after considering the material, convicted the appellant. We have heard the counsel appearing for the appellant and the A.P.P. for the State. We have noted the grounds of Appeal as raised, as well as, the submissions made by the Advocates appearing for the parties. We have gone through the respective testimony, as well as, the record.

4. It is clear from the testimony of PW1 and PW2 that the only case was that accused No.1, who was holding the *gupti,* had committed the murder. There was no allegation or case made out by the prosecution that the appellant i.e. accused No.2, who was armed with the chopper, had made any assault. On the contrary, the evidence is very clear that the

person with the *gupti* had assaulted deceased Anil and the other accused were merely standing. Accused No.2, therefore, cannot be held responsible for the homicidal death of the deceased Anil. According to us, the appellant is innocent or, at least, the evidence is not sufficient to convict the appellant for the offence punishable under Section 302 read with Section 34 of the IPC.

5. PW3 – Shivaji Waman Lilag and PW4 – Kashinath Shankar Awad, who were the Panch witnesses of the spot, were declared hostile. Nothing could be elicited from these witnesses. PW 3 – Shivaji was the witness to the weapon. No other witnesses were examined so far as the spot, as well as, the discovery of the weapon in question are concerned. Therefore, the prosecution failed to prove the spot of incident, as well as, the weapon used for the alleged offence.

6. PW1 – Vijay Ganpat Narvekar deposed that he along with the other i.e. deceased and PW2 were moving around in a drunken condition initially in Kamathipura area and then in Mumbai Central Station. They were waiting for the train to come. They were sleeping on the Platform No.1 of

the Mumbai Central Station. This witness deposed that he found Vilas standing with a *gupti* and one person with a chopper. These persons had snatched money and wrist watch from PW2 - Vilas. They could not get anything from this witness. The person who had *gupti* in his hand went to Anil and was trying to wake him up. Anil shouted and because of sudden jerk and movement, the *gupti* pierced in his stomach and Anil fell down. The other three, one with chopper and the other two, who were empty-handed, were watching the incident. They ran away as injured Anil fell down. However, this witness had identified the accused. This witness admits that all of them, including deceased Anil, were drunk. Thereafter, they went to Kamathipura. All of them had slept on the same Railway bench. He was unable to remember the clothes of the attackers.

7. PW2 – Vilas also corroborates the version of PW1. He had also identified the accused. PW5 – Mohan Ramdas Kamath, Ex-Special Executive Magistrate conducted a Parade. This witness deposed that he had not gone through the guidelines issued by the High Court for conducting such Identification Parades. He also deposed that he had not maintained any record and the earlier records were destroyed due to rain.

He also deposed that he is ignorant to the important aspects which should be incorporated in such Memorandum. The facts of the case was not mentioned in Exhibit-16. The aspect about the visit to the lock-up to know about the features of the accused was also not in the Memorandum. This witness further deposed that he had not recorded the selection of dummies personally as per the appearances of the accused. He further deposed that he had also not recorded that the Police brought 14 persons to act as dummies, out of which he had selected six. The four persons were selected to act as Panchas and the remaining two were selected for the Parade. He also deposed that he had discussion with the identifying witnesses. He also deposed that the presence of both the Panchas, when accused took their position, was not recorded in Exhibit-16 and Exhibit-17. He also deposed that he had not enquired from the witnesses whether they had any opportunity of seeing the suspects prior to the Parade. He also deposed that he had not recorded anything about the antecedents of the Panchas. This witness also deposed that he was not an SEM on 11th October, 1996. He was again called for Identification Parade on 11th October, 1996. Initially, he was called for the same on 1st August, 1996. He deposed that the accused No.1, on 11th March, 1996, was identified as

an assailant by a *gupti* in the Parade. This witness also, according to us, in view of his deposition itself, cannot be relied upon to maintain the conviction. In the present case, no conviction can be based solely on the evidence of identification of the accused as not supported by material testimony of the other witnesses.

8. PW6 – Suresh Rajaram Shinde was in charge of the Bombay Central Police Station. He had recorded the FIR. He sent the dead body to Nair Hospital. The clothes on the dead body of the deceased were taken charge of under the Panchanama. He arrested accused Nos.1 and 2 on 3rd October, 1996. Their clothes were also seized and sent for the Chemical Analyzer' sReport. On the basis of the voluntary statement, article 1 was recovered. However, as noted above, the spot of occurrence, as well as, the article in question, have not been proved by the prosecution, as they have not been supported by the respective Panch witnesses. No other witness has supported the same i.e. the spot, as well as, the articles in question. He deposed that he was not aware whether the said SEM conducted any Parade in the Police Station. No proper explanation was given why the Identification Parade was conducted after

12th October, 1996. Their explanation was that between 3rd October, 1996, to 12th October, 1996, they were searching for the SEM, though they had a List of the Special Executive Magistrates at the Police Station. He also admits that the article was recovered from an open-ended cement pipe and the label was also not visible on the said article, including the signature of the Panchas. He also admits that there was no specific mark or identification of the said article. He admits that he did not locate independent witnesses to the scene of offence. There was no other corroborative or circumstantial evidence to prove the offence of the accused in question. The accused also, in their statement, have denied the charges. The accused No.2 was brought from Delhi and was identified in such Identification Parade for the first time.

9. Considering the evidence, as well as, the material placed on the record, the homicidal death of the deceased Anil is not in dispute and remained unchallenged. However, according to us, the prosecution has failed to bring on the record, the material evidence to link the appellant-accused with the offence. Both PW1 and PW2 admitted that they were drunk and were sleeping on Platform No.1. They further deposed that they

were moving around in Bombay Central area, including Kamathipura area and were wining and dining the whole night. They were waiting for the train to come. The Panch witness could not support the prosecution case so far as the spot of the occurrence and they also could not support the prosecution case of the weapon or discovery of the same. The deposition of the SEM shows that the Identification Parade itself was not conducted by following the procedure as laid down by the High Court. Therefore also, such Identification parade cannot be relied. The accused No.2, in the present case, was brought from Delhi. There was no proper justification given for conducting such a Parade so late. The fact that the incident took place on 29th July, 1996, at about 3.00 p.m. is also material in the background that, at that time, as deposed, deceased along with PW 1 and PW2 were in a drunken state. It is difficult to accept the testimony of such witnesses to convict the accused under Section 302, 394, 397 of the IPC. The evidence itself shows that there was no intention to kill the deceased Anil. The intention, if any, was only to rob Anil. The piercing of the *gupti* appears to be accidental. However, in view of the above as recorded, we are of the view that the prosecution has failed miserably to prove beyond reasonable doubt that accused No.2 only has committed the offences in

question. It is unsafe to convict the appellant on such shattered material and evidence of the prosecution. Therefore, the learned Judge was wrong in convicting the accused No.2, based on the basis of such evidence witnesses. According to us, the evidence does not prove conclusively the guilt of the appellant.

10. For the reasons stated above, the order of conviction dated 13th January, 2000, is quashed and set aside. There is substance in the Appeal. The Appeal is accordingly allowed and the appellant-accused is ordered to be released forthwith, if not required for any other offence.

11. We quantify the fees to be paid to the Advocate for the appellant at Rs. 750/- for this Appeal.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]